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No. 77-1310

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY RICCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 566 F. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1977. A petition for rehearing, with a suggestion for rehearing en banc, was denied on February 15, 1978. The petition for a writ of certiorari was filed on March 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether delay in sealing the original recordings of court-authorized wire interceptions of petitioner's conversations precluded the use before trial of transcripts and

tapes of the intercepted conversations to refresh the recollection of a government witness who had participated in the conversations.

STATEMENT

Following a jury trial in the spring of 1977 in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy and substantive violations of the federal narcotics laws, 21 U.S.C. 841 and 846. He was sentenced as a second offender to seven years' imprisonment, to be followed by a six-year term of special parole. The court of appeals affirmed (Pet. App. 1a-8a).

1. On August 17, 1973, Westchester County Court Judge John C. Cousins signed an order pursuant to the New York eavesdropping statute (N.Y. Crim. Proc. Law 700.05, *et seq.* (McKinney 1971)) permitting state law enforcement officers to intercept wire communications on the telephone of Peter Mengrone through September 18, 1973. On that date, and again on October 18, 1973, Judge Cousins signed one-month extension orders. On October 24, 1973, Mengrone was arrested on a narcotics charge and the state terminated the interception. On November 5, 1973, twelve days after the termination of the interception, Judge Cousins sealed the original tape recordings.

Mengrone and Albert Rossi, a co-conspirator, pleaded guilty to federal narcotics charges, and petitioner's trial was severed from that of his co-conspirators. In January 1976, during the trial of the co-conspirators,[1] various intercepted telephone conversations between Mengrone

[1]Five defendants were convicted. See *United States* v. *Angelo Ricco*, 549 F. 2d 264 (C.A. 2), certiorari denied *sub nom. Indiviglia* v. *United States*, 431 U.S. 905.

and his co-conspirators, including petitioner, were admitted into evidence in connection with Mengrone's appearance as a government witness.

On July 21, 1976, petitioner moved to suppress the Mengrone tape recordings on the ground that they had been improperly sealed. Petitioner also moved to exclude Mengrone as a witness, claiming that his testimony was tainted by his having seen transcripts of his own telephone conversations with petitioner and their co-conspirators prior to and during 1976 trial.

Following an evidentiary hearing, the district court issued an order suppressing evidence obtained through interception, based upon a finding that the twelve-day delay in sealing the tapes was not excusable. *United States* v. *Anthony Ricco*, 421 F. Supp. 401 (S.D. N.Y.). The district court, however, denied petitioner's motion to prohibit use of Mengrone as a witness (*id.* at 411).

Prior to petitioner's trial, Mengrone listened to the tape recordings and read transcripts of his conversation with his co-conspirators.

2. The evidence adduced at trial "overwhelmingly established" (Pet. App. 3a) that petitioner was a narcotics supplier involved in a large-scale conspiracy dealing in heroin and cocaine. The nature and operation of the conspiracy were described at trial through the testimony of co-conspirators Rossi and Mengrone, which was corroborated by other substantial evidence.

Neither the tape recordings nor the transcripts of Mengrone's telephone conversations were offered in evidence, nor was Mengrone shown on direct examination any transcriptions of taped conversations to refresh his recollection or for any other purpose. Although the great bulk of Mengrone's testimony concerned events and conversations that were unrelated to the telephone

interceptions, he did testify on direct examination to two conversations that had been recorded pursuant to the intercept orders (Tr. 688-691). On cross-examination Mengrone was asked, on two occasions, to read transcriptions of suppressed tape recordings for the purpose of refreshing his recollection and impeaching his credibility (Tr. 772-774; Ricco Exhibits C and D for identification).

ARGUMENT

Petitioner contends (Pet. 5-16) that Mengrone's testimony was statutorily barred[2] because his recollection had been refreshed, prior to trial, with the tape recordings that had been suppressed. This contention was properly rejected by the court of appeals in an opinion upon which we principally rely.

18 U.S.C. 2518(8)(a) provides that, where tape recordings of intercepted conversations are not promptly sealed, the contents of the conversations or evidence derived therefrom shall not be disclosed in a manner that would otherwise be authorized by subsection (3) of Section 2517. That section applies only to the disclosure of the contents of intercepted conversations by a person "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States * * *." Other types of disclosure by law enforcement officers are covered by Sections 2517(1) and (2); the latter authorizes disclosure "to the extent such use is appropriate to the proper performance of [the investigative or law enforcement officer's] official duties." Section 2518(8)(a) contains no proscription barring disclosure under Section 2517(2) on account of noncompliance with the section's sealing requirement (see

[2]No claim is, or could reasonably be, made that Fourth Amendment rights were violated (see Pet. App. 8a).

United States v. *Fury*, 554 F. 2d 522 (C.A. 2), petition for a writ of certiorari pending, No. 76-6828. To the contrary, it explicitly authorizes use of duplicate recordings for the purposes specified in Section 2517(2).

The only disclosure of the tapes or evidence derived therefrom in this case was made by law enforcement officials to Mengrone before trial. The court of appeals properly found (Pet. App. 5a) that "Mengrone's direct testimony, in which he gave his own recollection of two conversations that had been intercepted, did not constitute any 'Disclosure' of the tapes or the transcripts or of 'evidence derived therefrom.' " Moreover, the court was also correct in concluding (*ibid.*) that "[r]efreshing a witness' recollection before trial * * * falls not within §2517(3) but rather within §2517(2) * * *."

Reading Section 2517(2) to permit the pre-trial use of intercepted conversations to refresh a witness's recollection comports with the intent of Congress that the section would permit the use of intercepted conversations "to develop witnesses" (S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968)) and reflects the most reasonable construction of the provision.[3] In contrast to the suppression provisions

[3]It does appear from the Senate Report that Congress intended that the use *at trial* of evidence of intercepted conversations to refresh a witness's recollection would be governed by Section 2517(3). See S. Rep. No. 1097, *supra*, at 100 (1968). Although in so indicating, the Senate Report refers to *Monroe* v. *United States*, 234 F. 2d 49 (C.A.D.C.), certiorari denied, 355 U.S. 875, in which the pre-trial use of unlawfully intercepted conversations to refresh a witness's recollection was permitted, the court of appeals correctly concluded (Pet. App. 7a) that this reference "gives rise to conflicting inferences." We agree with the court that the best interpretation is that the drafters intended "that when the procedures of the proposed statute were followed, transcripts of intercepted communications might be disclosed *at trial* and also might be there used for the purpose of refreshing recollection although *Monroe* did not involve such use" (*ibid.*; emphasis in orginal).

of Section 2518(10), which are designed to deter official conduct violating constitutional or statutory requirements and to protect the privacy of illegally intercepted conversations, the purpose of the non-admissibility provision of Section 2518(8)(a) is prophylactic—it protects against possible tampering with the tapes that would make them unreliable as evidence.[4] It is for this reason that the only statutorily specified consequence of a failure to present tapes for prompt sealing is exclusion of their use at trial, while other authorized uses are not proscribed. Even where the prompt sealing requirement is satisfied, any pre-trial refreshment of a witness's recollection would perforce have to be by means of unsealed duplicates (the original being unavailable because sealed); thus, the reliability of a witness's trial testimony is not related to compliance with the sealing requirement, and suppression of that testimony would be a senseless measure not furthering the purposes of Section 2518(8)(a).[5]

Finally, in this case there was no evidence of bad faith on the part of the government or of tampering with the tapes, and the twelve-day delay in sealing, during part of

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[4]The fact that use of the tapes and transcripts themselves is excluded from trial when there is an improper delay in sealing is a strong incentive for law enforcement officers to comply with the sealing requirement. Any additional incentive that would flow from prohibiting the use of such evidence to refresh the recollection of witnesses would surely be minimal. Cf. *United States* v. *Calandra*, 414 U.S. 338, 350-352.

[5]In view of these considerations, it is entirely irrelevant that the court had already ruled that the tapes would be inadmissible at trial at the time a duplicate was used, in trial preparation, to refresh Mengrone's recollection. Moreover, it would in any event be wholly impractical to condition the pre-trial use of the tapes to refresh a witness's recollection on their admissibility, which will often not be determined until after pre-trial preparations are substantially completed. See 18 U.S.C. 2518(10)(a).

which time the tapes were being duplicated, was not very different from sealing delays that have been held permissible in other cases.[6] Yet petitioners contend that the sealing delay in this case precludes not only introduction of evidence of the intercepted conversations at trial, but also the testimony of a key witness because his memory had been refreshed, before trial, with tape recordings and transcripts of the intercepted conversations. The court of appeals properly declined to construe the statute to require such an unreasonable result.[7]

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[6]The courts of appeals are in agreement that reasonable delays in sealing, attributable to use of the tape recordings in connection with preparation for trial or with continued investigation, do not require suppression, particularly where there is evidence that the tapes were kept securely. See *United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7), certiorari denied, March 20, 1978 (No. 77-938) (9 to 26 day delays); *United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855 (5 week delay); *United States* v. *Sklaroff*, 506 F. 2d 837 (C.A. 5), certiorari denied, 423 U.S. 874 (14 day delay). See also *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

[7]We note, in addition, that questions concerning the effect of a delay in sealing tape recordings of intercepted conversations are not likely to be of continuing importance. As we first informed this Court in our brief in opposition in *Falcone* v. *United States*, *supra* (Nos. 74-5500 and 74-5619), the Department of Justice in February 1975 instituted procedures to remind federal officials responsible for electronic surveillance of their obligation to comply with the sealing requirement of 18 U.S.C. 2518(8)(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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